

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)**

**Case No: CA&R 56/09
Delivered: 13-11-2009**

In the matter between:

BUTANA SOTYU

Appellant

and

THE STATE

Respondent

CORAM: WILLIAMS J et MJALI AJ

JUDGMENT ON APPEAL

MJALI AJ:

1. The 24 year old appellant was arraigned on a charge of murder in the Regional Court, Colesberg. He pleaded self defence. The regional magistrate rejected his defence and convicted him of murder. He was sentenced to fifteen years imprisonment. He now appeals against the sentence on the grounds that the magistrate erred in finding that there are no substantial and compelling circumstances to justify a departure from the imposition of the prescribed minimum sentence.
2. The salient facts are summarised as follows. On the evening of 26 August 2001 the appellant was at Kefana Tavern where he bought a bottle of wine, drank a portion thereof and at a certain stage fell asleep. When he woke up his wine was missing and this angered him. Upon enquiry he was informed that Andile had removed empty

bottles from the table. He confronted Andile Africa and was informed that he had confronted the wrong person as there were two Andiles on the premises. He searched and found Andile Mkhonywana (the deceased). At that time the deceased was playing pool. The appellant confronted him, held him by his collar and pulled him outside. This prompted the deceased to throw the appellant on the ground. The appellant got up, took out a knife from his pocket and fatally stabbed the deceased once on the left side of the chest.

3. Mr A. Van Tonder, for the appellant, argued that the cumulative effect of the appellant's personal circumstances as well as the mitigating circumstances which stem from the facts of the case constitute substantial and compelling circumstances justifying a departure from the prescribed minimum sentence of fifteen years imprisonment. Such circumstances are the following. The appellant passed standard 6 at school. At the time of sentencing he was 26 years old. He is not married and has no children. He lived with his grandparents, watched over their cattle and in that way contributed to their income. The appellant made a report to the police shortly after the incident occurred. Alcohol played a role. The appellant was furious due to the fact that someone had taken his wine.
4. Together with the said mitigating factors the magistrate had to take into account the aggravating circumstances. The appellant is not a first offender. He has a previous conviction for assault with intent to do grievous bodily harm for which he was sentenced to 9 months imprisonment wholly suspended for 5 years. The offence *in casu* was committed barely 7 months after he received this suspended sentence. The Appellant has shown no remorse but has maintained his version of self defence throughout the proceedings. Murder is a grave offence and has dire consequences for the next of kin of the

deceased. In our view the magistrate correctly balanced such circumstances against the legitimate interests of the community.

5. It is well recognised that where a minimum sentence has been prescribed such sentence must be imposed unless the court is satisfied that substantial and compelling circumstances that justify the imposition of a lesser sentence exist. The discretion of the trial court is thus limited to the existence or otherwise of the substantial and compelling circumstances. Bearing in mind that punishment is pre-eminently a matter for the trial court, a court of appeal has no general power to interfere with the sentence it imposes. It may do so only if the trial court did not exercise its discretion on sentence in a judicial manner. A magistrate is frequently said to exercise his discretion improperly where he has precluded himself from applying his mind to the issue of sentence because of a material misdirection of law or fact, or because his sentence is shockingly severe, or markedly disparate from a just sentence, or so unreasonable or arbitrary that no reasonable court would have imposed it.
6. Whilst in our view, a sentence of imprisonment somewhat shorter than that imposed might arguably also have been appropriate, it cannot be said that the court below did not exercise its discretion properly. We find no evidence that he has overemphasised or underemphasised any particular consideration. There is accordingly no basis on which to interfere with the sentence imposed.
7. **In the result the appeal is dismissed.**

G N Z MJALI

ACTING JUDGE

NORTHERN CAPE DIVISION

I concur

C C WILLIAMS

JUDGE

NORTHERN CAPE HIGH COURT

On behalf of the Appellant	Adv A Van Tonder
Instructed by	Kimberley Justice Centre
On behalf of the Respondent	Adv Q H Hollander
Instructed by	Director Public Prosecutions